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In The
Supreme Court of the United States

UNIVERSITY OF PHOENIX,

Petitioner,

v.

UNITED STATES EX REL.
MARY HENDOW AND JULIE ALBERTSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST

With the written consent of the parties, reflected in letters on file with the Clerk, *Amicus Curiae* the National Defense Industrial Association ("NDIA") submits this brief in support of Petitioner, pursuant to Rule 37.3(a) of this Court.[1]

NDIA is a non-profit organization comprised of more than 1,200 corporations and 39,000 individuals spanning the entire spectrum of the defense industry. Members include individuals from academia, government, the military services, small businesses, corporations, prime contractors, and the international community. They fulfill a large share of the Department of Defense's ("DOD") contracts for goods and services. Members are located in and perform services and contracts throughout the United States.

Application of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, is of great concern to NDIA's members. The FCA subjects defendants to treble damages and civil penalties of $5,500 to $11,000 for each false claim. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9) (inflation adjustment pursuant to 28 U.S.C. § 2461). Moreover, such claims can be brought by any citizen as a *qui tam* relator. 31 U.S.C. § 3730(b). The relator may share in the recovery. 31 U.S.C. § 3730(d).

Defense contractors are particularly susceptible to FCA lawsuits brought by *qui tam* relators. In the past

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[1] No party to this proceeding authored this brief in whole or in part, and no person or entity other than the National Defense Industrial Association ("NDIA") or its members contributed money to the preparation or submission of the brief. *See* Sup. Ct. R. 37.6.

twenty years, more than thirty percent of the *qui tam* cases have involved government procurement contracts. U.S. Gov't Accountability Office, GAO-06-320R, Information on False Claims Act Litigation 28 (2006). More than a quarter of those suits involved DOD contracts. *See id.* at 26. According to recent statistics, district courts within the Ninth Circuit handled more than eighteen percent of all *qui tam* cases filed between 1987 and 2005. *Id.* at 27. Thus, the Ninth Circuit's decision under review, which NDIA believes employs a fundamentally flawed approach, will have a substantial impact on government contracting and NDIA's members. As such, NDIA has a significant interest in this matter.

SUMMARY OF ARGUMENT

In *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), the Ninth Circuit drastically expanded the reach of the FCA. Specifically, it decided that an alleged false statement or course of conduct in connection with establishing eligibility to obtain benefits under Title IV of the Higher Education Act (the "HEA") could render all requests for payment under the HEA *false* for FCA purposes, even if the payment requests were not false or did not result in financial harm to the government.

In other words, the ruling allows a *qui tam* relator – or the government – to bring an FCA lawsuit without requiring allegations that the defendant "use[d] . . . a false record or statement to get a false or fraudulent claim paid[,]" as expressly required by the FCA. 31 U.S.C. § 3729(a)(2). The Ninth Circuit also muddied the application of the law by expanding the elements of an FCA action and departing from limitations recognized by other

circuits. The impact of the ruling extends beyond the facts of *Hendow*. Defense contractors face substantial risk of increased liability under the FCA because of the Ninth Circuit's ruling.

This Court should grant certiorari because clear guidance is needed for all parties to FCA actions. The Ninth Circuit's decision is not only fundamentally wrong; it has added more confusion to an already convoluted array of cases interpreting the FCA. This Court needs to exercise this opportunity to provide a clear set of elements required to maintain an FCA action. Until it does so, parties and courts will be unable to determine what alleged activity is sufficient to warrant an FCA action. Additionally, judges will be unable to provide jurors instructions that will allow them to understand and apply the law to the facts of any given case.

In expanding the scope of the FCA, the Ninth Circuit has departed from the reasoning of other circuits, thus subjecting contractors to inconsistent treatment based upon the location of a *qui tam* suit. The Ninth Circuit's holding subjects contractors to potential FCA liability for a virtually infinite number of regulatory or statutory violations that may not be related to a claim for payment. Indeed, under the Ninth Circuit's holding, a contractor could still be subject to FCA liability even if it violates a regulatory provision which would not cause the government to deny payment. Under *Hendow*, the FCA would swallow whole the administrative and contractual disputes process that Congress has established to deal with contracting issues. As a result, the contractor would be subject to treble damages and civil penalties under the FCA no matter how minor the alleged regulatory violation.

The Ninth Circuit's decision could encourage *qui tam* relators to pursue FCA claims for settlement value even where there is no harm to the Government. *Qui tam* relators are motivated to bring suits by the promise of obtaining as much as thirty percent of the judgment. *See* 31 U.S.C. § 3730(d)(2). If the FCA is not applied consistently and in a manner that prevents frivolous and vexatious lawsuits by *qui tam* relators, businesses will be unable to manage the risks of FCA liability. Responsible businesses will be discouraged from providing valuable, needed services to the government, and the costs of government procurement will increase. NDIA urges this Court to grant the Petition for a Writ of Certiorari to provide guidance and ensure consistency for maintaining FCA lawsuits.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT'S *HENDOW* DECISION CAUSES SIGNIFICANT CONFUSION AS TO THE ELEMENTS REQUIRED TO MAINTAIN AN FCA ACTION, SUBJECTS GOVERNMENT CONTRACTORS TO UNWARRANTED LIABILITY, AND RAISES THE COST OF FEDERAL PROCUREMENTS.

A. Concrete Guidance From This Court for Applying the FCA Is Essential.

Under the plain language of the FCA, there must be either a "false or fraudulent claim for payment or approval" or a "false record or statement" which is used "to get a false or fraudulent claim paid" for liability to attach. 31 U.S.C. § 3729(a)-(b). Without guidance from this Court,

the lower courts have adopted two theories for FCA liability beyond the typical overcharge case – the "false certification" theory and "promissory fraud" (or fraud-in-the-inducement). In false certification cases, the claim may be accurate in that the request for payment is not overstated, but the falsity lies in the certification of compliance with conditions necessary to obtain payment. Promissory fraud cases generally require a showing that a contractor made false statements to obtain the contract and that the falsity resulted in financial harm to the government throughout the life of the contract. At issue for this Court are the proper limits of these theories.

Under the false certification theory, the Ninth Circuit stated that "two major considerations" exist: "(1) whether the false statement is the cause of the Government's providing the benefit; and (2) whether any relation exists between the subject matter of the false statement and the event triggering the Government's loss." *Hendow*, 461 F.3d at 1171 (*quoting United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) (quotations omitted)). The Ninth Circuit explained that four "conditions" are used in evaluating these "considerations." *See id.* at 1171-73.

First, according to the Ninth Circuit, there must be a false claim, which can include *either* a false "statement" or a "course of conduct." *Id.* at 1171, 1174. The false claim need only involve one falsity, no matter how minor, as to any of hundreds of boilerplate requirements. *See id.* at 1171. Second, the claim must be a "false statement of compliance with a government regulation that is a precursor to government funding." *Id.* at 1172 (quotations omitted). According to the Ninth Circuit, this includes a false certification, assertion, statement or "secret handshake" made to obtain a government contract *or* benefit status *or*

payments. *See id.* Third, the claim must be "material," which means it must be: (a) a prerequisite to obtaining a government benefit; (b) a *sine qua non* of receipt of government funding; and (c) conditioned on the certifications. *See id.* at 1172-73. Under this prong, the Ninth Circuit explains there need be no explicit statement making any of these requirements a "condition of *payment*" because a condition of participation is the same as a condition of payment. *See id.* at 1176. Fourth, the falsity need not be an actual claim for payment. *See generally id.* at 1173, 1177. Under *Hendow*, the falsity needs only be integral to the causal chain leading to payment, and how the claim is made with respect to timing or number of stages involved is immaterial. *Id.* at 1177.

After setting forth this extensive list of required elements for a false certification case, the Ninth Circuit then set forth the required elements under the promissory fraud theory and concluded that the elements for both theories are substantially the same. *See id.* at 1173-74. One key difference, however, is that under the promissory fraud theory, no false statement of compliance with any government regulation or statute is required. *Id.* at 1173. According to the Ninth Circuit, if the contract or extension of government benefit was originally obtained through false statements or fraudulent conduct, then liability attaches to each claim submitted to the government under the contract, even if the claim is not false. *Id.* Subsequent claims become false because of the original false statements. *Id.* As to materiality, there must be a "causal" rather than "temporal" connection between the activity and the payment. *See id.* Thus, under either theory as posed by *Hendow*, liability can attach based on a true

representation that later becomes "false" through a course of conduct.

The Ninth Circuit's theories and elements are so complex that it is doubtful any juror could apply them correctly to any given set of facts, even if the Ninth Circuit were correct. This Court has recognized that the FCA was not designed to punish every type of fraud committed upon the government and that liability attaches not to underlying fraudulent activity but to a claim for payment. *See United States v. McNinch*, 356 U.S. 595, 599 (1958). Yet, in applying *Hendow*, judges and jurors are likely to find that any regulatory noncompliance, no matter how minor and no matter how attenuated from a claim for payment, is sufficient to state a claim under the FCA. Moreover, the Ninth Circuit's decision departs from the plain language of the statute, decisions of other circuits, and even its own prior decisions.

The elements set forth in decisions of other circuits are more consistent with the FCA than the decision of the Ninth Circuit. When deciding cases under the false certification theory, the majority of other circuits finds, consistent with the plain language of the FCA, that liability arises only when a claimant falsely certifies compliance with a statute or regulation that is a direct prerequisite to receiving government payment. *See, e.g., Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001) (discussing and expressly adopting the approach of the Fourth, Fifth and District of Columbia Circuits, and the previous position of the Ninth Circuit). For a viable action in these circuits, a certification must be made as an explicit condition of payment, that is, "to get a . . . claim paid." 31 U.S.C. § 3729(a)(2). Courts in these circuits also have stressed that "[a] general statement of adherence to all regulations or statutes

governing participation in a program through which federal funds are received is insufficient as a basis of False Claims Act liability." *United States ex rel. Graves v. ITT Educ. Servs.*, 284 F. Supp. 2d 487, 501 (S.D. Tex. 2003), *aff'd*, 111 F. App'x 296 (5th Cir. 2004). In other words, the courts have held that conditions of payment may give rise to FCA liability, but conditions of participation, such as future promises to comply with generally applicable statutes and regulations, do not. *Hendow* differs because it purports to convert all conditions of participation into conditions of payment.

In limited circumstances, courts have sustained FCA claims under the promissory fraud theory. Following this Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), other circuits have found that if a contractor commits a material fraud in obtaining a contract that increases the price to the government, then every invoice or request for payment under the contract could be a false claim under the FCA. *See, e.g., United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1786 (2006). Unlike the false certification theory, there is no requirement that a false statement be tied to discrete claims for payment. *See, e.g., id.* Accordingly, the promissory fraud theory opens contractors to exponentially greater liability by making each claim submitted under a contract a basis of liability without requiring a showing that the claim for payment was actually fraudulent. *See United States ex rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 393 F.3d 1321, 1326 (D.C. Cir. 2005).

Courts have carefully crafted limitations on the use of this promissory fraud theory, however, in light of its potentially crippling liability. *See, e.g., Graves*, 284

F. Supp. 2d at 503 ("The courts have emphasized that promissory fraud is a 'rare' basis for liability under the [FCA]."); *see also generally* JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 2.01[A][3], at 2-18 (3d ed. 2007). Before *Hendow*, even the Ninth Circuit recognized that promissory fraud is only "actionable in rare circumstances" because of its consequences. *Anton*, 91 F.3d at 1267. In *Anton*, the Ninth Circuit emphasized that "the promise must be false when made." *Id.* Other circuits have required an intent not to perform followed by "prompt, substantial nonperformance." *See, e.g., United States ex rel. Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 386 (5th Cir. 2003). The courts have routinely required that a *qui tam* relator have proof that the government would not have entered the contract "but for" the alleged false statement. *E.g., Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 788 (4th Cir. 1999) (affirming the dismissal of the complaint because documents submitted by the defendant showed that the false statement was immaterial to the government's action); *Odebrecht Contractors*, 393 F.3d at 1327 (dismissing the relator's claim because "no reasonable jury could find that [the defendant] fraudulently induced the Corps to enter into the contract" by submitting an unreasonably low bid); *United States ex rel. Wilkins v. N. Am. Constr. Corp.*, 173 F. Supp. 2d 601, 636-37 (S.D. Tex. 2001) (dismissing complaint because the "government must instead allege that a reasonable agency would not have approved the contract had the true facts been stated in the bid"). *Hendow* departs from the restrictions set forth in these cases. Specifically, it would allow a statement of compliance that was originally true to be the basis for an FCA action if the contractor later falls out of compliance.

Hendow also strays from the limitations on the promissory fraud theory in another important respect. Courts have generally required a showing that the initial false promise had a financial impact throughout the life of the contract. This Court's decision in *Marcus* illustrates this point. In that case, a *qui tam* relator brought a lawsuit under the precursor to the modern-day FCA alleging that the defendants had engaged in collusive bidding on certain government projects. 317 U.S. at 539. The Court concluded that this particular fraud infected every dollar paid by the government under the contract. *Id.* at 543-44. The Court stated:

> This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the [government entity] into the joint fund for the benefit of respondents. The initial fraudulent action and every step thereafter taken pressed ever to the ultimate goal – payment of government money to persons who had caused it to be defrauded.

Id. In *Marcus,* the fraud to obtain the contract – bid rigging – caused every invoice and request for payment throughout the contract to be overstated. *Id.* On the other hand, where the "taint" of the original fraud does not cause the costs of the resulting contract to be "swollen," courts have refused to impose liability under the FCA. *See, e.g., United States ex rel. Trice v. Westinghouse Hanford Co.*, No. 96-CS-171-WFN, 2000 WL 34024248, at *21-22 (E.D. Wash. Mar. 1, 2000) (dismissing complaint because false statements did not cause any "swollen estimates"). *Hendow* does not require this showing. In fact, the Ninth Circuit allowed the *qui tam* relator's claim to go forward without any showing of financial harm to the Government.

Courts have also opined on still other elements and theories of FCA liability. The Seventh Circuit appears to cut the elements of the FCA promissory fraud theory to one statement: "Failure to honor one's promise is (just) breach of contract, but making a promise that one *intends* not to keep is fraud." *Oakland City Univ.*, 426 F.3d at 917. Other courts have varied approaches on materiality or the need to show the government suffered damages. *See, e.g.*, *Straus*, 274 F.3d at 695 (declining to determine whether a relator must show the government suffered damages).

Taken together, the cases present a confusing morass of theories and elements that make it imperative for this Court to take jurisdiction to provide concrete guidance. This is especially true given the significant harm, discussed hereinafter, that the Ninth Circuit's erroneously broad FCA application will impose.

B. The Ninth Circuit's Decision in *Hendow* Is Unreasonably Broad.

Congress never intended the FCA to serve as a catch-all provision for regulatory and contractual enforcement. It was not meant to serve as a substitute remedy for contract breaches or regulatory missteps. In fact, courts have routinely held that "violations of laws, rules, or regulations alone do not create a cause of action under the FCA." *E.g.*, *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997) (*quoting Anton*, 91 F.3d at 1266 (quotations omitted)). Yet, *Hendow* essentially allows *qui tam* relators to do just that. *Hendow* has significantly broadened the ability of *qui tam* relators to bring FCA lawsuits based on a contractor's forward-looking statement of general compliance with

applicable regulations or statutes. In addition, *Hendow* allows a contractor to be sued under the FCA for breaches of contract or violations of regulations wholly unrelated to payment.

Filtering through the multitude of elements and theories set forth in *Hendow,* the Ninth Circuit held that a condition of participation is the same as a condition of payment. *See* 461 F.3d at 1176. Under its rationale, even if there was no original false statement of compliance with a regulation or participation provision, the subsequent "falling out of compliance" can create liability – even if the noncompliance is best addressed through available administrative or regulatory penalties. However, a submission of a non-false claim for payment at a time when the company is not in compliance with all regulatory requirements of participation in a federally-funded program should not be sufficient by itself to render the claim *false* for purposes of the FCA. This is especially true when there are available remedies to address such unintended failures of compliance. For instance, although defense contractors, like other businesses, must comply with federal and state employment laws, allegations of discrimination within a defense contractor's operations should not turn garden-variety employment disputes into a *qui tam* relator's bonanza of treble damages provided by the FCA. Such noncompliance should not be sufficient to establish that an accurate claim for payment is a false claim for purposes of the FCA. Yet, the Ninth Circuit's opinion could lead to such a reading of the FCA.

The Ninth Circuit recognized the proper limits of the FCA in an earlier decision. In *Anton*, the Ninth Circuit noted that "[i]t is the false *certification* of compliance which creates liability when certification is a prerequisite

to obtaining a government benefit." 91 F.3d at 1266. The *Anton* court explained:

> Mere regulatory violations do not give rise to a viable FCA action. This is particularly true here where regulatory compliance was not a *sine qua non* of receipt of state funding. *There are administrative and other remedies for regulatory violations.* . . . [A]bsent actionable false certifications upon which funding is conditioned, the [FCA] does not provide such a remedy.

Id. at 1267 (emphasis added). In *Hendow*, however, the Ninth Circuit did away with these restrictions. Now, according to the Ninth Circuit, every condition of participation in a highly regulated program is the *sine qua non* for payment. Thus, every regulatory requirement in the highly regulated world of government contracting could now be considered indispensable and essential to obtain payment.

Hendow represents a substantial and troubling departure from the statute and its reasonable interpretation. An isolated event of noncompliance subsequent to obtaining a contract does not meet the requirement of "us[ing] . . . a false record" to "get a . . . claim paid" as set forth in the FCA. 31 U.S.C. § 3729(a)(2). Nor does it make the claim for payment "false when made" or an "intentional, palpable lie" as required by the Ninth Circuit's reasoning in *Anton*. 91 F.3d at 1267. Indeed, if there is no falsity tied to the claim for payment, Congress did not intend for FCA liability to attach. But in *Hendow*, the court says that *every* claim submitted *after* statements were made to be eligible for participation in the program will be converted into false claims if there is any subsequent change in conditions of eligibility. Thus, under

Hendow, any violation of a relevant law, rule or regulation may be deemed sufficient to state a cause of action under the FCA. The Ninth Circuit's decision effectively makes *all* instances of noncompliance with regulations governing participation in government contracts *relevant* to government disbursement decisions.

C. The Ninth Circuit's Decision Will Subject Defense Contractors to FCA Liability for Contractual Breaches and Regulatory Non-Compliance Even When the Contracting Governmental Authority Would Not Refuse Payment.

The *Hendow* decision could open the floodgates to lawsuits alleging that a contractor's failure to comply with any one of thousands of requirements constitutes a false certification for payment. The following scenarios illustrate the mischief that could occur.

For most large dollar contracts, potential contractors must undergo an evaluation to ensure compliance with equal opportunity laws as set forth in Parts II and IV of Exec. Order No. 11,246 (Sept. 28, 1965), 48 C.F.R. § 22.805 (2006). And, through a standard contract clause, the contractor promises to comply with those various laws. 48 C.F.R. § 52.222-26. Congress has also provided for contractual and administrative remedies that may be enforced by the Government Contracting Officer for non-compliance. 48 C.F.R. § 22.809. At the same time, Congress has enacted laws for individuals to pursue remedies for employment discrimination. *See generally* 42 U.S.C. § 2000e-5. The *Hendow* decision encourages disenchanted employees to sidestep the employment discrimination resolution process and seek to share in wide-ranging FCA damages. An employee could assert that the company's alleged

discrimination violated its general contractual promise to comply with federal and state employment discrimination laws. *See* 48 C.F.R. § 52.222-26. As a result, instead of being liable under discrimination laws, a defense contractor could be liable for treble damages and civil penalties under the FCA for every request for payment made under its contract. By this means, *Hendow* would encourage plaintiffs to avoid the discretionary administrative remedies that Congress has prescribed.

In another example, any contractor that receives a contract over $500,000 in a negotiated acquisition must agree to a subcontracting plan in which it agrees to goals for use of small and socially-or-economically-disadvantaged businesses. *See* 48 C.F.R. §§ 19.702, 19.704(a)(1). The government has specific administrative remedies for non-compliance. If a contractor does not make a good faith effort to meet its goals, it is in material breach of the contract. 15 U.S.C. § 637(d)(8). The government can assert liquidated damages in an amount equal to the missed goal. 15 U.S.C. § 637(d)(4)(F); 48 C.F.R. § 19.705-7(b). Disputes over the propriety of liquidated damages assessments or over a termination for default are subject to the administrative and disputes process of the Contract Disputes Act ("CDA"), codified at 41 U.S.C. §§ 601-613. Using *Hendow*, however, a *qui tam* relator could bring an FCA action alleging that every payment made under the contract was a false claim because the company was not in compliance with its subcontracting plan. As such, the discretion of the Government Contracting Officer to determine whether it is appropriate to declare a material breach of contract and assess liquidated damages for the non-compliance would be usurped by the *qui tam* relator. And, the ability of the

government and the contractor to resolve the dispute through the CDA process would be eliminated.

This Court should be wary of allowing juries to substitute their judgment for decisions that are entrusted by statute to the discretion of government officials. There are, indeed, certain instances of technical non-compliance with law or regulation that such officers, in the wise exercise of their discretion, may choose not to pursue. *See, e.g., United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1377-78 (D.C. Cir. 2000), *aff'd*, 322 F.3d 738 (D.C. Cir. 2003); John T. Boese & Beth C. McClain, *Why* Thompson *is Wrong: Misuse of the False Claims Act to Enforce the Anti-Kickback Act*, 51 ALA. L. REV. 1, 46 (1999). Allowing a relator to pursue claims based on discretionary statutes and regulations allows the *qui tam* relator to trump the government's discretion and put a court in the position of making decisions that should be left to an administrative agency. *See id.* at 49. For instance, in *United States ex rel. Windsor v. Dyncorp, Inc.*, 895 F. Supp. 844, 847 (E.D. Va. 1995), the trial court dismissed a *qui tam* relator's FCA allegation that a contractor had submitted false claims by asserting that it was in compliance with the Davis-Bacon Act when it knew it had misclassified workers. The court recognized that, pursuant to regulations implementing the Davis-Bacon Act, disputes between a contractor and the Department of Labor regarding the classification of employees are to be resolved by the agency after investigations and hearings. *Id.* at 851-52. Accordingly, "[t]o permit [the relator]'s claim to go to a jury would result in bypassing the carefully crafted administrative scheme for resolving [such] disputes." *Id.* at 852. Thus, the court granted the contractor's motion for summary judgment on all counts. *Id.* at 855.

As a result of *Hendow*, defense contractors may now risk FCA suits for every nominal regulation related in any way to a government contract by a third party who has no incentive to resolve issues consistent with the government's interest or the public good. "Relators who have no interest in the smooth execution of the Government's work have a strong dollar stake in alleging fraud whether or not it exists." 13 Op. Off. Legal Counsel 249 (1989). The District of Columbia Circuit has correctly assessed the dangers that flow from stepping into the shoes of the federal agency on these types of decisions via *qui tam* suits. It has stated:

> A court that found contracts invalid in a *qui tam* action where the government has not joined the plaintiff would have unilaterally divested the government of the opportunity to exercise precisely the discretion that is among the key differentiations of voidness from voidability: the discretion to accept or disaffirm the contract on the basis of complex variables reflecting the officials' views of the government's longterm interests.

Siewick, 214 F.3d at 1378. Through *Hendow*, the Ninth Circuit has significantly eroded that discretion to the detriment of the public good.

D. *Hendow* Will Increase the Costs of Government Procurement.

Hendow also will cause significant public harm by increasing the costs of government procurement without providing substantial benefit consistent with the purposes of the FCA. In the end, *Hendow* will only serve to drive responsible businesses away from the defense market and

increase the costs for the taxpayer for vital military goods and services.

Contractors will find it difficult and costly to prevent or defend the many claims that are sure to follow in the wake of the Ninth Circuit's significant blurring of the elements required to sustain an FCA action. Firms, faced with potentially unpredictable liabilities, will limit their dealings with the government or be forced to raise prices to compensate for the costs of litigation. *See generally* William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1839-40 (1996). Companies with important commercial technology needed by the military will choose not to enter government contracting. *See, e.g.*, William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 SUP. CT. ECON. REV. 201, 208 (1998) ("Firms that have achieved success in commercial markets will not deal with a seller whose requirements entail substantial costs, including nontrivial exposure to civil and criminal liability.").

In general, the costs of compliance by contractors are "ultimately absorbed by DoD in the form of increased unit costs for military equipment and services." Jeffrey A. Drezner et al., RAND Corp. Nat'l Def. Research Inst., *Measuring the Statutory and Regulatory Constraints on DoD Acquisitions* 13 (2006). The government may bear the costs of the increased number of lawsuits that would arise because of the Ninth Circuit's unwarranted FCA expansion. If a contractor successfully defends a case, those costs may be recoverable under its government contract. *See* 48 C.F.R. § 31.205-47(b)(2); *see also* Kovacic, *The Civil False Claims Act*, *supra*, at 226. Moreover, the increased risk of *qui tam* lawsuits and judgments from the *Hendow* decision

may ultimately be passed along to the government in the form of increased prices for goods and services. *See, e.g.*, *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511-12 (1988) ("The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability . . . ").

CONCLUSION

For the reasons stated above, *Amicus Curiae* NDIA urges this Court to grant the University of Phoenix's Petition for a Writ of Certiorari, accept this case for review, and reverse the Ninth Circuit's decision in *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166 (9th Cir. 2006).

Respectfully submitted,

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